



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-38/52274

PRELIMINARY RECITALS

This matter had been scheduled for a hearing but was dismissed for nonappearance. A rehearing was requested and granted. The original request was filed February 1, 2002, under Wis. Stats. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Marinette County Dept. of Human Services in regard to Medical Assistance (MA). A hearing was held on April 26, 2002, at Marinette, Wisconsin.

The issue for determination is whether the Division of Hearings and Appeals has the authority to order the actual payment of an institutionalized spouse's income to the community spouse so as to bring the community spouse's income up to the maximum community spouse monthly income allowance permitted by law.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

By:

(petitioner's rep)

State Agency:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Jill Messenger, Lead worker
Marinette County Dept Of Human Serv
Wisconsin Job Center Suite B
Marinette, WI 54143

Administrative Law Judge:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Marinette County.

2. (petitioner) is institutionalized. (petitioner's rep) is his community spouse.
3. (petitioner) parents are his court appointed guardians.
4. (petitioner) parents directed that his income be paid to the nursing home thus eliminating his income from the community spouse monthly income allowance. This was effective February 1, 2002.

DISCUSSION

No substantive hearing was held here. Though there is a certain amount of tension between (petitioner's spouse) and (petitioner) and his parents, there was no dispute as to the facts here. The question is: does the Division of Hearings and Appeals have the authority to direct that (petitioner) income actually be paid to his community spouse, (petitioner's spouse) to bring her income to the maximum community spouse monthly income allowance permitted by law.

The statutory provision that governs spousal impoverishment law in Wisconsin states the following:

(3) **ATTRIBUTION OF INCOME.** (a) Except as provided in par. (b), *no income of a spouse is considered to be available to the other spouse during any month in which that other spouse is an institutionalized spouse.*

(b) Notwithstanding ch. 766, for the purposes of sub. (4), the following criteria apply in determining the income of an institutionalized spouse or a community spouse:

1. Except as determined under subd. 2. or 3., unless the instrument providing the income specifically provides otherwise:

- a. Income paid solely in the name of one spouse is considered to be available only to that spouse.
- b. Income paid in the names of both spouses is considered to be available one-half to each spouse.
- c. Income paid in the name of either or both spouses and to one or more other persons is considered to be available to each spouse in proportion to the spouse's interest or, if payment is made to both spouses and each spouse's individual interest is not specified, one-half of the joint interest is considered to be available to each spouse.

2. Except as provided in subd. 3., if there is no trust or other instrument establishing ownership, income received by a couple is considered to be available one-half to each spouse.

3. Subdivisions 1. and 2. do not apply to income other than income from a trust if the institutionalized spouse establishes, by a preponderance of the evidence, that the ownership interests in the income are other than as provided in subds. 1. and 2.

(4) **PROTECTING INCOME FOR COMMUNITY SPOUSE.** (a) *After an institutionalized spouse is determined to be eligible for medical assistance, in determining the amount of that institutionalized spouse's income that must be applied monthly to payment for the costs of care in the institution, the department shall deduct the following amounts in the following order from the institutionalized spouse's income:*

1. The personal needs allowance under s. 49.45 (7) (a).

2. The community spouse monthly income allowance calculated under par. (b) or the amount of income of the institutionalized spouse that is actually made available to, or for the benefit of, the community spouse, whichever is less.

3. A family allowance for each family member equal to one-third of the amount by which the family member's monthly income is exceeded by the following:

- a. Beginning on September 30, 1989, and ending on June 30, 1991, 122% of one-twelfth of the poverty line for a family of 2 persons.

b. Beginning on July 1, 1991, and ending on June 30, 1992, 133% of one-twelfth of the poverty line for a family of 2 persons.

c. Beginning on July 1, 1992, 150% of one-twelfth of the poverty line for a family of 2 persons.

4. The amount incurred as expenses for medical or remedial care for the institutionalized spouse.

(b) *The community spouse monthly income allowance equals the greater of the following:*

1. The minimum monthly maintenance needs allowance determined under par. (c) or the amount determined at a fair hearing under sub. (8) (c), if such an amount has been determined, minus the amount of monthly income otherwise available to the community spouse.

2. The amount of monthly support which a court orders the institutionalized spouse to pay for the support of the community spouse.

(c) 1. For any year, the minimum monthly maintenance needs allowance equals the lesser of the amount determined under subd. 2., or the sum of the following:

a. One-twelfth of 200% of the poverty line for a family of 2 persons.

b. Any excess shelter allowance under par. (d).

2. The minimum monthly maintenance needs allowance in a year may not exceed \$1,500 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the year involved.

3. In making the calculation under subd. 1. a., when the poverty line is revised the department shall use the revised amount starting on the first day of the 2nd calendar quarter beginning after the date of publication of the revision.

(d) The excess shelter allowance equals the amount by which 30% of the amount determined under par. (c) 1. a. is exceeded by the sum of the following:

1. The community spouse's expenses for rent or mortgage principal and interest, taxes and insurance for his or her principal residence and, if the community spouse lives in a condominium or cooperative, any required maintenance charge.

2. The standard utility allowance established under 7 U.S.C. 2014 (e), except that if the community spouse lives in a condominium or cooperative for which the maintenance charge includes utility expenses, the standard utility allowance under 7 U.S.C. 2014 (e) is reduced by the amount of the utility expenses included in the maintenance charge.

Wis. Stats, § 49.455 (emphasis added)

The statutes clearly direct that county agencies automatically allocate the institutionalized spouse's income to the community spouse in an amount that gives that spouse the maximum community spouse monthly income allowance. The amount of that allowance is established by statute and is currently \$2,175.00. See MA Handbook, Appendix 23.6.0. This allocation of income is for the purpose of establishing eligibility and is not the same as directing actual payment of income. The law does permit the Division of Hearings and Appeals to establish a higher maximum community spouse monthly income allowance but this is not the issue here.

The Division of Hearings and Appeals is a creation of the state legislature and has only those powers given to it by the legislature. Equitable authority is not one of those powers.

"An ALJ does not possess any equitable powers but must apply the law as it is written. (See, *Final Decision*, OAH Case No. A-40/44630, [by Timothy F. Cullen, Secretary, DHSS] (Office of Administrative Hearings, n/k/a, Division of Hearings & Appeals- Work & Family Services Unit December 30, 1987)(DHSS); "An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates. [citation omitted]" *Oneida County v. Converse*, 180 Wis.2nd 120, 125, 508 N.W.2d 416 (1993). "No proposition of law is better established than that administrative agencies have only such powers as are expressly granted

to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448 (1944); see also, *Neis v. Education Board of Randolph School*, 128 Wis.2d 309, 314, 381 N.W.2d 614 (Ct. App. 1985). "As a general matter, an administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates [citation omitted]". *Brown County v. DHSS Department*, 103 Wis.2d 37, 43, 307 N.W.2d 247 (1981). "An agency or board created by the legislature has only those powers which are expressly or impliedly conferred on it by statute. Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted. [citation omitted]" *Browne v. Milwaukee Board of School Directors*, 83 Wis.2d 316, 333, 265 N.W.2d 559 (1978)."

Division of Hearings and Appeals Decision # MPC-13/49594, issued 8/9/01.

Applied here this means that, while the Division of Hearings and Appeals can direct that the DHFS and county agencies take action concerning issues for which it is permitted to conduct hearings, it does not have that authority over private parties. The Division of Hearings and Appeals does not have the authority to order that the income of (petitioner) actually be paid to (petitioner's spouse). The statute quoted above does, however, define the community spouse monthly income allowance as the greater of the amount ordered by the Division of Hearings and Appeals or the amount of monthly support which a court orders the institutionalized spouse to pay for the support of the community spouse. The remedy (petitioner's spouse) is through the circuit court not the Division of Hearings and Appeals.

CONCLUSIONS OF LAW

That the Division of Hearings and Appeals does not have the authority to direct that (petitioner) income actually be paid to (petitioner's spouse) to increase her community spouse monthly income allowance.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of
Milwaukee, Wisconsin, this 9th day of
May, 2002

/sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals
5-7/DDF